

Amendment No. 1 to HB1337

**Marsh
Signature of Sponsor**

AMEND Senate Bill No. 379*

House Bill No. 1337

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 65-31-102, is amended by deleting existing subdivisions (4) and (12), and adding the following language as new subdivisions:

() “Agricultural purposes,” for purposes of this chapter only, includes surface activities, such as plowing, planting, and combining, but does not include blasting, setting drainage tiles, subsoiling, or other subsurface activities;

() “Blasting” means the use of an explosive device for the excavation of earth, rock, or other material or the demolition of a structure;

() “Board” means the underground utility damage enforcement board, created by § 65-31-114;

() “Design locate request” means a communication to the one-call service in which a request for locating existing utility facilities for predesign or advance planning purposes is made;

() “Excavate” or “excavation”:

(A) Means an operation for the purpose of the movement, placement, or removal of earth, rock, or other materials in or on the ground by use of mechanized equipment or by discharge of explosives, and includes augering, backfilling, blasting, boring, digging, ditching, drilling, grading, pile-driving, plowing-in, pulling-in, ripping, scraping, sub-soiling, trenching, and tunneling; and

(B) Does not include:

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(i) Pavement milling or pavement repair that does not exceed the depth of the existing base stone and pavement;

(ii) Routine railroad maintenance activities, including removal and replacement of base material up to twenty-four inches (24") below the flow line of the ditch or ground surface of the railroad right-of-way adjacent to the existing track structure if the work is conducted by railroad employees or railroad contractors and is carried out with reasonable care so as to protect any installed underground facilities placed in the railroad right-of-way by agreement with the railroad;

(iii) Routine road maintenance activities; and

(iv) The tilling of soil for agricultural purposes or the digging of holes for fence posts on private property in any area that is not located within a recorded easement of an operator or that is not located within one hundred feet (100') of the edge of the pavement of a street or highway;

() "Excavator" means any person who engages in activities described in subdivisions (A) and (B) in the definition of "excavate" contained in this section;

() "Executive committee" means the executive committee created by § 65-31-114(f);

() "Routine road maintenance activities":

(A) Means activities carried out by or for those responsible for publicly-maintained roadways if the activities:

(i) Occur entirely within the right-of-way of a public road, street, or highway;

(ii) Are carried out with reasonable care so as to protect any utility-owned facilities and laterals placed in the right-of-way;

(iii) Are carried out within the limits of any original excavation on the traveled way, shoulders, or drainage ditches of a public road, street, or highway, and do not exceed eighteen inches (18") in depth below the flow line of the ditch or the grade existing prior to the activities; and

(iv) If involving the replacement of existing structures at a depth greater than eighteen inches (18"), replace those existing structures in their previous locations and at their previous depths; and

(B) Does not include work on a roadway done pursuant to a contract awarded by a state or local government through a bid process for which plan drawings have been developed in advance;

() "Utility":

(A) Means any line, system, or facility used for producing, storing, conveying, transmitting, or distributing communications, electricity, gas, petroleum, petroleum products, hazardous liquids, water, steam, sewerage, and other underground facilities; and

(B) Does not include any railroad or the Tennessee department of transportation;

SECTION 2. Tennessee Code Annotated, Section 65-31-105, is amended by adding the following as a new subsection:

(f) All underground utilities owned by an operator that are installed on or after January 1, 2017, shall be installed in a manner that will make those underground utilities locatable using a generally accepted electronic locating method.

SECTION 3. Tennessee Code Annotated, Section 65-31-107, is amended by deleting the word "Operators" in the first sentence in subsection (a) and substituting instead the language "Subject to the requirements of subsection (b), operators" and by deleting subsection (b) and substituting instead the following:

(b) All operators are required to join the one-call service and utilize the services of the notification center as follows:

(1) Operators that are members of the existing one-call service on the effective date of this act shall remain members;

(2) Operators with more than fifty thousand (50,000) customers served underground or one thousand (1,000) miles of facilities underground, who are not members, shall join the one-call service no later than January 1, 2016;

(3) Operators with more than twenty-five thousand (25,000) customers served underground or five hundred (500) miles of facilities underground, who are not members, shall join the one-call service no later than January 1, 2017;

(4) All operators that do not meet the thresholds described in subdivision (b)(1), (2), or (3) shall join the one-call service no later than January 1, 2018; and

(5) This subsection (b) shall not apply to operators whose total amount of underground facilities constitutes less than twenty percent (20%) of their total utility plant in service.

(c) There shall be only one (1) one-call service for this state.

(d) The one-call service shall provide for a proportional method of apportioning the cost of operating the notification center among its members.

SECTION 4. Tennessee Code Annotated, Section 65-31-109, is amended by adding the following language as a new subsection:

(c) For the purposes of this section, repair or replacement of an existing traffic control device at its existing location and existing depth shall be considered an emergency, and compliance with the notice requirements of this section and § 65-31-106 shall not be required of any local or state government responding to the emergency repair or replacement of a traffic control device.

SECTION 5. Tennessee Code Annotated, Section 65-31-111, is amended by adding the following as a new subsection:

(e) Each operator whose utility facilities have been damaged shall report the incident using the Damage Information Reporting Tool (DIRT) utilized by the Common Ground Alliance.

SECTION 6. Tennessee Code Annotated, Section 65-31-112, is amended by deleting the section and substituting instead the following:

(a) Any person who violates this chapter, or the rules promulgated under this chapter, shall be subject to a civil penalty as follows:

(1) For a first violation, the violator shall complete a course of training concerning compliance with this chapter as determined by the executive committee;

(2) For a second or subsequent violation, the violator shall complete a course of training concerning compliance with this chapter as determined by the executive committee or pay a civil penalty in an amount set by the executive committee, not to exceed two thousand five hundred dollars (\$2,500) per incident, or both; and

(3) Notwithstanding subdivisions (e)(1) and (2), if any violation was the result of gross negligence or willful or wanton misconduct as determined by the

executive committee, the executive committee shall require the violator to complete a course of training concerning compliance with this chapter as determined by the executive committee and pay a civil penalty in an amount set by the executive committee, not to exceed five thousand dollars (\$5,000) per incident.

(b)

(1) For the purposes of this chapter, monetary civil penalties shall not be levied against any department of this state. In the event that a state department is found by the executive committee to be noncompliant, the executive committee may submit a notice of noncompliance to the department head along with a request for an action plan for future compliance.

(2) For the purposes of this chapter, monetary civil penalties shall not be levied against a county, city, town, utility district, or other political subdivision of this state unless the board finds that the county, city, town, utility district, or other political subdivision of this state has engaged in a pattern of willful noncompliance with the requirements of this chapter.

(c) Except as provided in subsection (e), this section shall not limit any person's right to pursue any additional civil remedy otherwise allowed by law.

(d) Any person who is required to complete a course of training under subsection (a) shall be responsible for paying for the cost of the training.

(e)

(1) Any excavator who violates this chapter may be issued a notice of violation by the inspector, and the inspector may require any excavator to cease work on any excavation, or not start a proposed excavation, until the excavator complies with this chapter.

(2) An excavator who complies with this chapter shall not be liable for damage that the excavator causes to an operator's underground facility, if:

(A) The operator received the notification required by § 65-31-106;

(B) The operator fails to locate its underground facilities as required by § 65-31-108; and

(C) The damage is a proximate result of the operator's failure to locate its underground facilities as required by § 65-31-108.

(3)

(A) Any person who violates § 65-31-106 and whose subsequent excavation or blasting damages utility facilities or sewer laterals shall also indemnify the affected facility owner or operator and the one-call service against all claims or costs incurred, if any, for personal injury, property damage, or service interruptions resulting from damaging the utility facilities or sewer laterals.

(B) The requirements of subdivision (e)(3)(A) shall not apply to any state agency, county, city, town, utility district, or other political subdivision of this state.

(f) Any person who knowingly and willfully removes or otherwise destroys the stakes or other physical markings used to mark the horizontal route of an underground facility commits the offense of vandalism under § 39-14-408, and shall be subject to the punishment for vandalism under § 39-14-105.

SECTION 7. Tennessee Code Annotated, Section 65-31-114, is amended by deleting the section and substituting instead the following:

(a) There is created within the Tennessee regulatory authority, created by § 65-1-101, an underground utility damage enforcement board for the purpose of enforcing this chapter.

(b) The Tennessee regulatory authority will provide administrative and investigative support for the board, both subject to concurrence by the board. Pursuant to § 65-2-122, the Tennessee regulatory authority shall charge the expenses associated with the administration and investigative duties of the board back to the board, subject to concurrence by the board.

(c) The board shall be composed of fifteen (15) members. Except for initial appointments, members who are not ex officio members shall be appointed to four-year terms. Appointments to the board shall be made as follows:

(1) The president of Tennessee One-Call, Inc., or the president's designee, who shall be a voting, ex officio member;

(2) One (1) member shall be a person representing the interests of Tennessee natural gas distribution systems, to be appointed by the governor, whose initial term shall be four (4) years. In considering appointees, the governor shall review a list of qualified persons submitted by the Tennessee Gas Association;

(3) One (1) member shall be a person representing the interests of Tennessee utility districts, to be appointed by the speaker of the senate, whose initial term shall be four (4) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Association of Utility Districts;

(4) One (1) member shall be a person representing the interests of the Tennessee cable industry, to be appointed by the speaker of the house of representatives, whose initial term shall be four (4) years. In considering

appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Cable and Telecommunications Association;

(5) One (1) member shall be a person representing the interests of large Tennessee incumbent local exchange carriers with more than one hundred thousand (100,000) customers, to be appointed by the speaker of the house of representatives, whose initial term shall be four (4) years;

(6) One (1) member shall be a person who represents the interests of public utilities, as defined in § 65-4-101, and who provides water or wastewater services, to be appointed by the speaker of the senate, whose initial term shall be four (4) years;

(7) One (1) member shall be a person representing the interests of Tennessee towns and cities, to be appointed by the governor whose initial term shall be three (3) years. In considering appointees, the governor, shall review a list of qualified persons submitted by the Tennessee Municipal League;

(8) One (1) member shall be a person representing the interests of small Tennessee incumbent local exchange carriers, to be appointed by the speaker of the senate, whose initial term shall be three (3) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Telecommunications Association;

(9) One (1) member shall be a person representing the interests of Tennessee counties, to be appointed by the speaker of the house of representatives, whose initial term shall be three (3) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee County Services Association;

(10) One (1) member shall be a person representing the interests of Tennessee road builders, to be appointed by the governor, whose initial term

shall be three (3) years. In considering appointees, the governor shall review a list of qualified persons submitted by the Tennessee Road Builders Association;

(11) One (1) member shall be a person representing the interests of the excavation industry, to be appointed by the speaker of the senate, whose initial term shall be two (2) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Associated Builders and Contractors of Tennessee;

(12) One (1) member shall be a person representing the interests of interstate pipelines, to be appointed by the speaker of the house of representatives, whose initial term shall be two (2) years;

(13) One (1) member shall be a private property owner representing agricultural or homeowners' interests, to be appointed by the governor, whose initial term shall be two (2) years; and

(14) One (1) member shall be a person representing the interests of municipal electric utilities with underground facilities, to be appointed by the speaker of the senate, whose initial term shall be two (2) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Municipal Electric Power Association; and

(15) One (1) member shall be a person representing the interests of cooperative electric systems with underground facilities, to be appointed by the speaker of the house of representatives, whose initial term shall be two (2) years. In considering appointees, the speaker shall review a list of qualified persons submitted by the Tennessee Electric Cooperative Association.

(d) Every two (2) years, the board shall elect a chair from among its members and other officers as the board deems necessary.

(e) The members of the board shall serve without compensation.

(f)

(1) The board shall elect an executive committee, which shall be responsible for levying civil penalties and taking action as described in § 65-31-116.

(2) The executive committee shall be composed of the following members of the board:

(A) One (1) member from subdivision (c)(10), (11), or (13);

(B) One (1) member from a local government; and

(C) One (1) member from a utility.

(3) A member serving on the executive committee shall be limited to two (2) consecutive one-year terms.

(g) The board and the executive committee may hold meetings and vote by telephone, television, or other electronic means.

SECTION 8. Tennessee Code Annotated, Title 65, Chapter 31, is amended by adding the following as new sections:

65-31-115.

(a) The board has the power and authority to:

(1) Promulgate rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, for the conduct of the affairs of the board;

(2) Adopt a seal for the board, prescribe the style of the seal, and alter the seal at the board's pleasure; and

(3) Make and enter into contracts.

(b) The board shall:

(1) Through its executive committee, initiate investigations and conduct hearings as required by § 65-31-116;

- (2) Meet a minimum of two (2) times per calendar year;
- (3) Examine data regarding underground utility damage and make recommendations to the general assembly for further updates to this chapter;
- (4) Manage the underground damage prevention fund created by § 65-31-117;
- (5) Assess its annual operating cost to operators in an amount equal to the amount necessary to offset the cost of investigative and administrative services performed by the Tennessee regulatory authority at the direction of the board. The annual operating costs shall be apportioned in a proportional manner and collected by the one-call service from the operators; and
- (6) Subject to the availability of funding in the underground damage prevention fund created by § 65-31-117, contract with appropriate entities or agencies to conduct training and public awareness for damage prevention.

65-31-116.

- (a) Upon receipt of a complaint of a violation of this chapter, the executive committee shall initiate an investigation of the complaint by requesting that the Tennessee regulatory authority designate an employee of the authority who will investigate the complaint at the executive committee's direction.
- (b) Any investigator acting at the direction of the executive committee may issue citations for violations of this chapter. Any issuing investigator shall indicate on the citation the time and location for a hearing concerning the alleged violations contained in the citation. Any citation may include a recommendation for the penalty to be assessed under § 65-31-112.
- (c) If the person to whom the citation is issued under subsection (b) does not pay the citation or submit to ordered training, or both, within thirty (30) days, then the executive committee shall appoint a hearing officer to conduct a hearing and issue an

initial order pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. The hearing shall be held at the time and place set forth in the citation. The hearing shall be conducted in the county where the excavation referenced in the citation occurred, unless otherwise agreed to by the person to whom the citation is issued. In the event the excavation occurred in more than one (1) county, then the hearing shall be conducted in the county where the greatest amount of excavation referenced in the citation occurred.

(d) Following a hearing under subsection (c), the executive committee shall:

(1) Dismiss the complaint;

(2) Affirm the citation and reduce the penalty recommended by the investigator; or

(3) Affirm the citation and assess an appropriate penalty.

(e) A person aggrieved by the final decision of the executive committee may, within sixty (60) days, file a petition for judicial review pursuant to § 4-5-322. In the case of a decision involving an excavation in proximity to underground facilities of a municipally-owned utility located in a county having a population of greater than three hundred thousand (300,000), according to the 2010 federal census or any subsequent federal census, the petition for review shall be filed in the chancery court located in that county. In all other cases, the petition for review shall be filed in the chancery court of Davidson County.

(f) Nothing in this chapter shall grant the executive committee or the board jurisdiction over damage to utilities located above ground.

65-31-117.

(a) There is created an underground damage prevention fund within the Tennessee regulatory authority. All civil penalties collected pursuant to this chapter shall be deposited into the underground damage prevention fund. Any moneys remaining in

the underground damage prevention fund at the end of the fiscal year shall not revert to the general fund, but shall remain in the underground damage prevention fund for the exclusive use of the board.

(b) The expenditure of moneys in the underground damage prevention fund shall be at the discretion of the board for the following purposes:

(1) Providing grants to operators with fewer than five thousand (5,000) customers to assist the recipient in complying with the mandatory notification center requirements of this chapter. However, grants shall not be used for operating expenses, and no grants shall be given for this purpose after January 1, 2018; and

(2) Contracting with providers of public awareness, educational, and compliance training.

65-31-118.

(a) Any person may submit a design locate request to the one-call service. The design locate request shall:

(1) Describe the tract or parcel of land for which the design locate request has been submitted with sufficient particularity, as defined by policies developed by the one-call service, to enable the facility owner or operator to ascertain the precise tract or parcel of land involved; and

(2) State the name, address, and telephone number of the person who has submitted the design locate request, as well as the name, address, and telephone number of any other person authorized to review any records subject to inspection under subdivision (b)(1)(C).

(b)

(1) Within fifteen (15) working days after a design locate request has been submitted to the one-call service for a proposed project, the facility owner or operator shall respond by one (1) of the following methods:

(A) Designate or cause to be designated by a locator under § 65-31-108, the location of all utility facilities and sewer laterals within the area of the proposed excavation;

(B) Provide to the person submitting the design locate request the best available description of all utility facilities and sewer laterals in the area of proposed excavation, which might include drawings of utility facilities and sewer laterals already built in the area, or other facility records that are maintained by the facility owner or operator; or

(C) Allow the person submitting the design locate request or any other authorized person to inspect or copy the drawings or other records for all utility facilities and sewer laterals within the proposed area of excavation.

(2) In the event that the one-call service charges a fee to a member operator for design location notification, the utility operator may recover that fee from the requestor.

(c) Upon responding pursuant to subsection (b), the facility owner or operator shall provide the response to the one-call service in accordance with one-call service procedures.

(d) An operator may reject a design locate request based upon homeland security considerations pending the operator obtaining additional information confirming the legitimacy of the request. The operator shall notify the person making the request of the denial and may request additional information through the positive response system provided by the one-call service.

(e) Nothing in this section shall supersede any federal, state, or local laws governing the confidentiality of the location of utility facilities.

(f) Any utility operator responding to a design locate request under this section shall not be liable for any damages associated with the response to the request.

(g) Nothing in this chapter shall amend, alter, or affect title 54, chapter 5, part 8.

(h) A design locate request shall not be used for excavation purposes.

65-31-119. The administrative and investigative support provided by the Tennessee regulatory authority is provided to the board in an advisory capacity only, and nothing in this chapter shall expand the jurisdiction of the Tennessee regulatory authority in any way.

65-31-120.

(a) Engaging in the activities described in subdivision (B) of the definition of “excavate” or “excavation” in § 65-31-102 shall not remove or impose liability per se for damage to underground utilities.

(b) Nothing in the definition of “excavate” or “excavation” in § 65-31-102 shall remove the obligation of any excavator, whether engaged in excavation or in activities described in subdivision (B) of the definition, from the reporting requirements of § 65-31-111.

SECTION 9. Tennessee Code Annotated, Section 4-29-238(a), is amended by adding the following as a new subdivision:

() Underground utility damage enforcement board, created by § 65-31-114.

SECTION 10. This act shall take effect upon becoming a law, the public welfare requiring it.